# Ng Hock Cheng v Pengarah Am Penjara & Ors

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-1 OF 1997(A)
MOHD AZMI, PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
27 NOVEMBER 1997

***Administrative Law*** *— Exercise of judicial functions — Judicial review — Power of court to interfere with punishment meted out by disciplinary board — Public officer dismissed from service by Public Services Commission — Court judicially reviewed and upheld disciplinary authority's finding of misconduct — Whether court may judicially review consequential order of dismissal and substitute it with lesser penalty*

The appellant was a government servant. He incurred heavy debts amounting to more than six times the amount of his monthly salary and became liable to disciplinary proceeding for reduction in rank or dismissal pursuant to Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 ('the General Orders'). The Public Services Commission, after deliberating on the appellant's representation, had dismissed him from service. The appellant's writ action for declarations that his dismissal be declared void was dismissed by the High Court and the order was confirmed by the Court of Appeal. The appellant applied for leave to appeal to the court which granted such leave to appeal on a question of law, ie whether a court had power to interfere with any punishment meted out by the Disciplinary Board. The main contention of the appeal before the court was that he should be meted out a lesser punishment than the order of dismissal made by the disciplinary authority in question.

**Held**, dismissing the appeal:

A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution. If the public officer succeeds in so impugning, any order of punishment, including an order of dismissal, can be declared invalid or void. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment. To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee.

A court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment. The court should not substitute its own view as to which was the appropriate penalty for the employee's misconduct, and whether the punishment should be a dismissal or a lesser penalty like a reduction in rank was not for the court to say. An employer, including a government, is the best person to judge the seriousness of misconduct of an employee.

Therefore, after the High Court had judicially reviewed and upheld the disciplinary authority's finding of misconduct or breach

of any provision of the code of conduct under the General Orders, in regard to any further and consequential order of punishment or penalty as prescribed by the General Orders and imposed on the public officer in question, the High Court and the Court of Appeal were right in not judicially reviewing such consequential order of dismissal or otherwise interfering with such order (see pp 158E–I and 159A–G).

[**Bahasa Malaysia summary**

Perayu merupakan seorang kakitangan kerajaan. Beliau telah menanggung hutang yang banyak yang berjumlah lebih daripada enam kali gaji bulanannya dan menjadi tertakluk kepada prosiding tatatertib untuk penurunan pangkat atau pemecatan menurut Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 ('Perintah-Perintah Am'). Setelah mempertimbangkan representasi perayu, Suruhanjaya Perkhidmatan Awam telah memecatnya daripada perkhidmatan. Tindakan writ perayu untuk perisytiharan supaya pemecatannya diisytiharkan terbatal telah ditolak oleh Mahkamah Tinggi dan perintah disahkan oleh Mahkamah Rayuan. Perayu memohon untuk kebenaran merayu kepada mahkamah yang membenarkan kebenaran demikian untuk merayu atas soalan undang-undang, iaitu sama ada sebuah mahkamah berkuasa mengganggu mana-mana hukuman yang dikenakan oleh Lembaga Tatatertib. Hujah utama rayuan di hadapan mahkamah adalah bahawa beliau haruslah dikenakan hukuman yang lebih ringan daripada perintah pemecatan yang dibuat oleh pihak berkuasa tatatertib berkenaan.

**Diputuskan**, menolak rayuan:

Seseorang pegawai awam berhak mempersoalkan sebarang pengataan atau tuduhan atas mana-mana pelanggaran tatatertib terhadapnya melalui kajian semula kehakiman tentang perlindungan yang diberikan oleh perkara 135 Perlembagaan Persekutuan. Sekiranya pegawai awam tersebut berjaya dalam persoalan, sebarang perintah hukuman, termasuk perintah pemecatan, boleh diisyitiharkan tak sah atau terbatal. Tetapi sekiranya pegawai awam tersebut gagal, sebarang perintah hukuman kekal dan tidak harus adanya kajian semula lanjut atas perintah hukuman. Untuk mengkaji semula maknanya bertindak bertentangan dengan konsep, dalam kes perintah pemecatan, bahawa sepatutnya tidak terdapat apa-apa penggajian yang bertentangan dengan kehendak majikan atau pekerja.

Sesebuah mahkamah mengganggu hanya atas jenis dan cara tuduhan terhadap seorang pegawai awam berbeza daripada hukuman berbangkit. Mahkamah tidak patut mengganti pandangan sendiri berhubung dengan penalti yang wajar untuk salah laku pekerja, dan sama ada hukuman haruslah merupakan pemecatan atau penalti yang lebih ringan seperti penurunan pangkat tidak terbuka kepada penentuan oleh mahkamah. Sesebuah majikan, termasuk kerajaan,

A adalah orang yang paling baik untuk menghakimi keseriusan salah laku seseorang pekerja.

Oleh itu, selepas Mahkamah Tinggi telah mengkaji semula dan mengesahkan keputusan pihak berkuasa tatatertib tentang salah laku atau pelanggaran mana-mana peruntukan kanun kelakuan di bawah
B Perintah-Perintah Am, berkaitan dengan mana-mana perintah hukuman lanjut dan berbangkit atau penalti seperti yang ditetapkan oleh Perintah-Perintah Am dan yang dikenakan atas pegawai awam berkenaan, Mahkamah Tinggi dan Mahkamah Rayuan adalah betul dalam tidak mengkaji semula perintah pemecatan berbangkit begitu atau sebaliknya mengganggu perintah demikian (lihat ms 158E–I
C dan 159A–G).]

**Notes**

For cases on the exercise of judicial functions, see 1 *Mallal's Digest* (4th Ed, 1995 Resissue) paras 51–70.

D

**Cases referred to**

*Bolton v Law Society* [1994] 1 WLR 512 (refd)

*Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361 (refd)

E *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996]1 MLJ 261 (refd)

**Legislation referred to**

Federal Constitution arts 132, 135

F Public Officers (Conduct and Discipline) (Cap D) General Orders 1980

Rules of Federal Court 1995 r 47(4)

**Appeal from**: Civil Appeal No A–01–25–94 (Court of Appeal, Kuala Lumpur)

G

*Gurbachan Singh* (*Bachan & Kartar*) for the appellant.

*Abdul Wahab bin Said* (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

**Peh Swee Chin FCJ** (delivering the judgment of the court): We have
H earlier dismissed this appeal and indicated we would give our reasons later. We hereby do so now.

The appeal was against the order of the Court of Appeal confirming an order of High Court at Ipoh which had earlier dismissed the appellant's writ action for declarations that his dismissal as a chief store keeper of the
I Prison Department be declared void; and an enquiry be heard into arrears of salary, etc.

Summarizing the facts which were not disputed, briefly, the appellant joined the government service in 1960 and rose to the rank of chief store

keeper at the detention camp at Kamunting, Taiping at the time of his disputed dismissal. According to the appeal, he had incurred heavy debts in trying to assist his father in the latter's bicycle business, that being pursued by creditors, he sought the advice of one Dato' Ibrahim, the head of his department, who advised him in effect to present against himself a bankruptcy petition as a debtor for an indebtedness to the tune of more than RM300,000. A B

It is to be borne in mind that under the former Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 applicable to the present appeal ('the General Orders'), the appellant's indebtedness being more than six times the amount of his monthly salary, the appellant became, ipso facto, liable to disciplinary proceeding for reduction in rank or dismissal, etc. C

For the purpose of the appeal which concerned only a very short legal but important point, it would not be necessary to set out in detail the three charges framed against the appellant, the show-cause letter and his representations in reply. The gist of such representations was that he had served faithfully the government for 28 years; his indebtedness being due to helping his father; and that he otherwise was of good character. D

The rules of natural justice appeared to have been applied and the appellant even admitted in cross-examination that he was given opportunity to answer all charges; that his dismissal was bona fide and that his rights were not infringed. E

The main contention of the appeal before us was therefore that he should be meted out a lesser punishment than the order of dismissal made by the disciplinary authority in question.

The Public Services Commission, after deliberating on the appellant's representations, had dismissed him from service and maintained the order of dismissal after further consideration on an appeal from the appellant. The appellant then launched the present civil suit which was subsequently dismissed as stated earlier. The Court of Appeal unanimously dismissed his appeal from the High Court's decision. F

The appellant applied for leave to appeal to the court which granted such leave to appeal limited to one question of law (vide r 47(4) of Rules of Federal Court 1995), it being as follows: G

> Sama ada pemohon telah dibuang kerja dengan sah dan sama ada mahkamah mempunyai kuasa untuk menyentuh hukuman yang telah diberikan oleh Lembaga Tata Tertib berkenaan. H

The said question of law meant in effect as to whether the appellant had been dismissed from public service validly and whether a court had power to interfere with any punishment meted out by the Disciplinary Board. The second part of the said question had of course, reference to the persisted contention of the appellant that he deserved a lesser punishment than the order of dismissal from public service. I

On the first part of the said question about whether the appellant was validly dismissed, nothing really turned on this except that a new point was

raised for the first time in this appeal before us, it being that of unfair procedure. We disallowed it to be so raised.

On the second part of the said legal question as to whether the court could interfere with the nature of the punishment meted out by the Disciplinary Board, the English case of *Bolton v Law Society* [1994] 1 WLR 512 was cited for support in the High Court, and in the Court of Appeal, additionally, it considered also *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996]1 MLJ 261.

The instant appeal dealt with a holder of a public office categorized under art 132 of the Federal Constitution which gives a special protection together with the rules of natural justice and a specially enacted procedure to such a holder. *Bolton*'s case dealt with disciplinary proceedings conducted by a professional body against its member, and it was therefore distinguishable from the instant appeal though a certain part of its reasoning was of persuasive force as will be seen later. The instant appeal, inter alia, very significantly involved a relationship of master and servant which was absent in *Bolton*'s case. Compendiously, in *Bolton*, a new solicitor disbursed prematurely money received from a building society for the benefit of the intending purchaser, foolishly but without dishonesty, in a sale and purchase of land which aborted. Full restitution of the actual sum was made.

The Disciplinary Tribunal convened on complaint and in exercising leniency, directed that he be suspended from practice for two years.

On appeal by Bolton, the Divisional Court while holding that it would require a strong case to interfere with the penalty as the disciplinary committee were the best people to weigh the seriousness of professional misconduct, substituted the order of suspension for two years with a fine.

The Court of Appeal of England reaffirmed the principle of a disciplinary tribunal of a professional body being the best persons to judge the seriousness of professional misconduct and that it would require an exceptional case to enable a court to interfere with their decision on the punishment. The said Court of Appeal stated that in view of the lapse of time from the granting of the stay of the order of the disciplinary tribunal until the determination of the appeal, it would be oppressive to reinstate now the order of suspension for two years and the decision of the Divisional Court was therefore confirmed for different reasons.

In *Tan Tek Seng*'s case, a senior assistant of a primary school was charged in court for misappropriating a sum of RM3,179 being unpaid salary of the school gardener who was absent from duty. Tan had subsequently made good the sum. The conviction and a sentence of six months' imprisonment of the relevant sessions court for Tan were varied, on appeal, to a finding of guilt with an order of binding over for good behaviour for a period of three years. Disciplinary proceedings were then instituted where it was decided that he be dismissed from service. Tan then filed a writ action seeking for the usual declarations that his dismissal be declared void and invalid; that arrears of salary be determined, etc. The action was dismissed by the High Court. On appeal to the Court of Appeal (quoting here only one of several points decided there, as being relevant to

the said question in the instant appeal), it was held in a majority judgment — in allowing the appeal — that the disciplinary authority must, when deciding what punishment it ought to impose on the particular public servant, act reasonably, and fairly that if it acted arbitrarily or unfairly or impose a punishment that was disproportionate to the misconduct, its decision on the punishment was liable to be quashed or set aside. The Court of Appeal then by a majority substituted the order of dismissal in effect with an order that the senior assistant of the primary school be reduced in rank and salary to those of an ordinary teacher.

It was held by the dissenting judge that the court should not substitute its own view as to which was the appropriate penalty for the employee's misconduct, and it was held further whether the punishment should be a dismissal or a lesser penalty like a reduction in rank was not for the court to say.

It should be emphasized in order to avoid confusion that the said question for which leave to appeal to this court was granted was in truth as to whether the High Court had the jurisdiction or power to vary any penalty imposed by the Public Services Commission as contra-distinguished from another related but no longer important question for the purpose of the instant appeal of whether the appellant had or had not been guilty of any misconduct which could render him liable in the first place to any penalty or punishment as provided by the General Orders.

After the High Court had judicially reviewed and upheld the disciplinary authority's finding of misconduct or breach of any provision of the code of conduct under the General Orders, in regard to any further and consequential order of punishment or penalty as prescribed by the General Orders and imposed on the public officer in question, the High Court was right in not judicially reviewing such consequential order of dismissal or otherwise interfering with such order. The Court of Appeal was also right for not interfering with the same for reasons which we will discuss as follows.

A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution which provids that no member of such service shall be dismissed or reduced in rank except: (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefor: see *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361. If the public officer succeeds in so impugning, any order of punishment, including an order of dismissal, can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.

A To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee. After all is said and done, persons in the public service categorized under art 132 of the Federal Constitution are in fact employees.

B Then again, there is the elementary principle that court will not normally decree a specific performance of a contract of personal service or its terms thereof. After a court intervenes by judicial review the question of the alleged disciplinary breach, the court should thereafter give due respect to this principle on the question of penalty.

C The intervention of the said art 135 and the rules of natural justice, etc in the case of a public officer is only one of two exceptions to this elementary principle. See *Mohd bin Ahmad.* It must be borne in mind that when a court declares as void an order of dismissal against a public officer categorized under art 132 of the Federal Constitution (see *Mohd bin Ahmad*), it does so because the accusation against him on which such an D order of dismissal is based, has been found to be invalidly made or conducted, so that the order of dismissal, and for that matter, any other order of penalty is thereby a non sequitur. The court in truth is not substituting the order of dismissal with its own measure of punishment and if in the latter case, it would amount to the court forcing the employer/ government to still employ him, or specifically enforcing a contract of E personal service.

It cannot be denied further that the disciplining of a public officer by his department head is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the Judiciary is the judicial F branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.

Just like a professional body being the best tribunal to judge the G seriousness of misconduct of its members, in a similar vein, an employer, including a government, is the best person to judge similarly the seriousness of misconduct of an employee.

Thus, we are of the opinion that on the narrow point in question, the majority judgment in *Tan Tek Seng* cannot stand though we express our agreement with the minority judgment on the same narrow point. H

We once again revert to the instant appeal. Likewise, we did not interfere with the order of dismissal despite what were said to be mitigating circumstances. The appellant would have to leave for greener pastures. We therefore dismissed the appeal with costs.

I *Appeal dismissed.*

Reported by Jafisah Jaafar